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No. 50

# In the Supreme Court of the United States

OCTOBER TERM, 1940

J. E. RILEY INVESTMENT COMPANY, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT

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## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–28) is unreported. The opinions in the Circuit Court of Appeals (R. 48–58) are reported in 110 F. (2d) 655.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1939 (R. 46). Petition for rehearing was denied March 16, 1940 (R. 47). The petition for a writ of certiorari was filed on April 11, 1940, and was granted on May 20, 1940. The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether an election by a taxpayer to compute depletion on a percentage depletion basis is made in its "first return," as required by Section 114 (b) (4) of the Revenue Act of 1934, when it is first made in an amended return, filed after the expiration of the period for filing the original return.

### STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (m) DEPLETION.—In the case of mines, * * * a reasonable allowance for depletion * * * according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *
>
> (n) BASIS FOR DEPRECIATION AND DEPLETION.—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.
>
> * * * * *
>
> SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) TIME FOR FILING.—

(1) GENERAL RULE.—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) EXTENSION OF TIME.—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

* * * * *

(4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the

property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section [U. S. C., Title 26, Sec. 114].

## STATEMENT

The facts as found by the Board of Tax Appeals (R. 19–22) may be summarized as follows:

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska, where it is engaged in the mining of gold. Flat is in a remote part of the Territory, and conditions of travel are such that it takes weeks for mail orig-

inating at that place to reach Tacoma, Washington, where the office of the Collector of Internal Revenue having jurisdiction over the petitioner is located. The slowness of the winter service invariably results in current tax-return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it has been the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to it by the Collector at Tacoma (R. 19–20). As pointed out in the Argument, however, the 1933 and 1934 forms were identical in all respects material for purposes of this case (see pp. 20–21, *infra.*)

When petitioner's return for 1934 was made out, its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to percentage depletion. Had petitioner's officers known of the statutory provision for percentage depletion, they would have elected to take advantage of it. Petitioner first actually learned of the provision in August 1935, when it was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934. The Commis-

sioner ruled that, as to the latter year, the taxpayer, by failing to claim percentage depletion in its original return, had lost the right to claim it thereafter (R. 20–22).[1]

On March 3, 1936, immediately after petitioner was advised that percentage depletion had been disallowed, it filed both an amended return claiming such depletion and a claim for refund (R. 8, 22). On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion (R. 29) and the court below affirmed (R. 46).

## SUMMARY OF ARGUMENT

1. Petitioner seeks to secure a deduction for depletion for 1934 computed according to the percentage-depletion method provided for in Section 114 (b) (4) of the Revenue Act of 1934. Under the terms of Section 114 (b) (4) the percentage-depletion method may be used only if the taxpayer specifically states in its "first return" under the Act

[1] The reason why a refund was made for 1933 while it was denied for 1934 was that Section 114 (b) (4) of the Revenue Act of 1932 allowed taxpayers to compute depletion on the percentage basis for 1933 without making any statement in their 1933 returns that they elected so to compute depletion. The section required, however, that taxpayers state in their 1933 returns whether they elected to compute depletion on the percentage basis for 1934 and all succeeding years, and provided that if no such election was made the taxpayer would have no right to percentage depletion for 1934 and succeeding years. Section 114 (b) (4) of the Revenue Act of 1934 simply reenacted Section 114 (b) (4) of the 1932 Act, giving, however, a new opportunity of election.

that it elects to adopt this method. Petitioner's "first return" under the Act was its return for the tax year 1934. Its original return for that year contained no statement of election; an amended return, filed after the expiration of the period for filing the original return, did, however, purport to elect the percentage-depletion method.

We believe it plain that a statutory election under the revenue acts, such as that provided for by Section 114 (b) (4), may be made only in the taxpayer's original return or in a timely amendment to the original return, and that an amendment is timely only if filed before the expiration of the period for filing the original return. No other period has any statutory warrant or any precedent in administrative practice. And allowance of an election by amendment filed after the time for filing the original return would, in practice, serve not only to circumvent the statutory scheme but also to impose a substantial administrative burden in the recomputation and readjustment of tax liabilities.

It is immaterial that petitioner was ignorant of the provision for percentage depletion; the construction or application of a statute cannot depend upon the mental state of those affected by it. Moreover, petitioner's ignorance is not readily excusable, since it was more than three years after the provision for percentage depletion was first enacted into law before petitioner discovered its existence.

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It is likewise immaterial that the decision below may work hardship on petitioner; the allowance of deductions does not depend upon considerations of equity. Moreover, the hardship is more apparent than real since petitioner's entire depletable capital has already been restored to it by deductions previously taken on the cost depletion basis.

2. There is no merit to petitioner's contention that the court below erred in disposing of the case on a ground not considered by the Board. In *Helvering* v. *Gowran,* 302 U. S. 238, this Court specifically held that a Circuit Court of Appeals may *affirm* a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* 309 U. S. 344, cited by petitioner, holds merely that a decision of a lower court may not be *reversed* on a ground abandoned below. That rule is inapplicable here.

## ARGUMENT

### I

Section 23 (m) of the Revenue Act of 1934 provides that in computing net income, there shall be allowed as a deduction in the case of mines, a "reasonable allowance for depletion". Section 23 (n) provides that the basis upon which depletion is to be allowed shall be as provided in Section 114. And Section 114 (b) (4) provides as follows:

> The allowance for depletion under section 23 (m) shall be, * * * in the case of metal mines, 15 per centum, * * * of the gross income from the property dur-

> ing the taxable year * * *. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, * * *.

It is plain that under this statutory scheme a taxpayer may take percentage depletion for the year 1934 and all succeeding years only if it states in its "first return" under the Act that it elects to compute depletion on this basis.[2] Admittedly, pe-

[2] Petitioner suggests in its brief (p. 8) that Section 23 (m), providing that there shall be a "reasonable allowance for depletion", is substantive in character, that Section 114, specifying the method for computing the allowance, is adjective in character, and, therefore, that failure to comply with the conditions of Section 114 cannot deprive petitioner of the positive right to an allowance granted by Section 23 (m). This contention overlooks Section 23 (n), which expressly provides that the basis for computing the allowance provided for in Section 23 (m) shall be that contained in Section 114. All of these provisions must obviously be read and considered together as parts of a

titioner's "first return" under the Act was its return for 1934. The question here is simply whether an amendment, filed on March 3, 1936, to petitioner's original return for 1934, filed on January 29, 1935, is such a part of the 1934 return that an election to compute depletion on the percentage basis, made for the first time in the amendment, satisfies the requirements of the statute.

The Government does not now contend that an election to take percentage depletion must be made in an original, as distinguished from an amended, return. *Haggar Co.* v. *Helvering,* 308 U. S. 389, is decisive on that issue. The Government's position is simply that the election may be made only in an original return or in a *timely* amendment, and that an amendment is timely only if it is filed within the period provided by the statute for filing the original return. Here the amendment was not filed until after the expiration of the statutory period for filing the original return.[3]

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whole; so considered, it is plain that Congress intended in Section 23 (m) to grant a deduction computed in the manner set forth in Section 114 and not otherwise. *Commodore Mining Co.* v. *Commissioner*, 111 F. (2d) 131, 133 (C. C. A. 10th). Moreover, since petitioner has already recovered its capital through depletion allowances based on cost (R. 21), it is difficult to see how it could claim any deduction representing a "reasonable allowance for depletion" without relying upon the percentage depletion provision of Section 114.

[3] Petitioner's original return for 1934 was required to be filed on or before March 15, 1935 (Section 53 (a) (1) of the Revenue Act of 1934). The Commissioner had authority to extend this statutory period to September 15, 1935 (Sec-

*Haggar Co.* v. *Helvering, supra,* is persuasive authority in support of the Government's position. That case involved the construction of the phrase "first return" as used in the capital stock provisions of the Revenue Act of 1934; the Court held that an amended return, filed within the extended period allowed by the Commissioner for filing the original return for the first year, was a timely return and should have been accepted. Throughout the opinion, stress is laid upon the fact that the amendment should have been accepted because it was timely, and the clear implication of the opinion is that it was timely because it was filed within the period allowed for filing original returns. The Court expressly pointed out, for example, that "it has long been the practice of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year" (308 U. S. at 393–394).[4]

Interpretation of the *Haggar* case to allow an election by amendment only within the time allowed for filing original returns accords with the

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tion 53 (a) (2)) but no authority whatever to accept a return filed after that date. The amendment involved in this case was not filed until March 3, 1936 (R. 8, 22).

[4] Although the Court in the *Haggar* case referred to *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388 (C. C. A. 4th), as an instance where an amended return was considered as a first return, its citation of that decision clearly does not indicate approval of the holding that the amended return in that case was timely since the Court was not concerned with that question.

opinion expressed by this Court in *Pacific National Co.* v. *Welch,* 304 U. S. 191. The taxpayer there, in filing its original return on March 14, 1929, elected to report its profits from realty sales according to the deferred-payment method. In 1931, it filed an amended return claiming that the profits should have been computed according to the installment method. In holding that the taxpayer was bound by the election it exercised in filing the original return, this Court stated (pp. 194–195):

> Change from one method to the other, as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns (§ 53 (a)) to include the period allowed for recovering overpayments (§ 322 (b)). *There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in question according to the deferred payment method, petitioner made an election that is binding upon it and the commissioner.* [Emphasis supplied]

The current of authority in the lower federal courts and in the Board of Tax Appeals is likewise to the effect that a statutory right of choice under the revenue acts "is exhausted on the expiration of

the time for filing returns." *Buttolph* v. *Commissioner,* 29 F. (2d) 695, 696 (C. C. A. 7th); *Commissioner* v. *Moore,* 48 F. (2d) 526 (C. C. A. 10th), certiorari denied, 284 U. S. 620; *Rose* v. *Grant,* 39 F. (2d) 340 (C. C. A. 5th); *Alameda Inv. Co.* v. *McLaughlin,* 33 F. (2d) 120 (C. C. A. 9th); *Radiant Glass Co.* v. *Burnet,* 54 F. (2d) 718 (App. D. C.); *Champlin* v. *Commissioner,* 78 F. (2d) 905 (C. C. A. 10th); *United States* v. *Pettigrew,* 81 F. (2d) 666 (C. C. A. 9th); *Kehoe-Berge Coal Co.* v. *Commissioner,* 41 B. T. A. 282; *Briarly* v. *Commissioner,* 29 B. T. A. 256.[5]

No other time limitation has any statutory warrant. The Revenue Act of 1934 provides for the filing of returns, made on the basis of the calendar year, on or before the 15th day of March following the close of the calendar year (Section 53 (a) (1)); it further provides that the Commissioner may grant a reasonable extension of time for filing returns, not exceeding six months in the case of resident taxpayers, under such rules and regulations as he may prescribe (Section 53 (a) (2)).[6] Under the rationale of the *Haggar* decision, taxpayers have a right to amend their returns at any time prior to

[5] Looking the other way are *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388 (C. C. A. 4th); *Lucas* v. *Sterling Oil & Gas Co.,* 62 F. (2d) 951 (C. C. A. 6th); *Morrow, Becker & Ewing, Inc.* v. *Commissioner,* 57 F. (2d) 1 (C. C. A. 5th); *cf. Johnston* v. *Commissioner,* 33 B. T. A. 551; *Raymond* v. *Commissioner* 34 B. T. A. 1171; *Connor* v. *United States,* 19 F. Supp. 97 (D. N. H.).

[6] See Articles 53-2 and 53-3, Regulations 86.

the expiration of the statutory period, as extended by the Commissioner, for filing the returns. But there is no statutory provision, and no regulation or practice,[7] which supports the view that an amendment may be filed as of right after the expiration of the statutory period for filing the original return. To graft a period for filing amendments on to the statutory period for filing original returns would in effect be to enlarge the period for filing returns without any legislative sanction therefor.

It is significant that percentage depletion was first allowed with respect to metal mines in the Revenue Act of 1932. Section 114 (b) (4) of that Act allowed taxpayers to take percentage depletion for 1933, and required them to state in their 1933 returns whether they elected to compute depletion on this basis for 1934 and all succeeding years; the depletion allowance for 1934 and subsequent years was to be computed in accordance with the election made in the 1933 returns. Section 114 (b) (4) of the 1934 Act reenacted Section 114 (b) (4) of the 1932 Act, but gave a new opportunity of election. It seems apparent that if, as petitioner contends, an election may be made by amendment to the original return after the expiration of the

[7] This is subject to the exception of Article 43-2 of Regulations 86, which permits the filing of an amended return for the purpose of deducting a loss, occurring during a prior taxable year but not then ascertained, at any time within the period allowed for claiming a refund.

period for filing the original return, there would have been no necessity for Congress to have given taxpayers a new opportunity of election in the 1934 Act; taxpayers who failed to elect to take percentage depletion in their 1933 returns could simply have filed an amendment to that return, making the election in the amendment. Thus, the fact that Congress deemed it necessary expressly to provide for a new opportunity of election is strong indication that it did not believe that the statutory choice provided for by Section 114 (b) (4) could be exercised by amendment after the period for filing original returns had expired.

Practical considerations, too, support the view that an election to take percentage depletion may not be made by amendment after expiration of the period for filing original returns. In one year, cost depletion may appear to a given company to be more advantageous than percentage depletion; a year later percentage depletion may appear to be the more advantageous. If an election between these methods of computation is subject to change by amendment after the expiration of the statutory period for filing returns, taxpayers would be given an opportunity to shift bases in the light of developments occurring after the original choice was required to be made. And, since there is no legal limit to the number of amended returns, a taxpayer could presumably change from one method to another as often as he saw fit. This would not only adversely affect the revenues but would also

entail a real administrative burden in the recomputation and readjustment of tax liabilities. It seems obvious that avoidance of this very type of shift was the motive compelling Congress to provide that the election must be made in the first return and that failure to elect percentage depletion in the first return should deprive the taxpayer of this method of computation in all subsequent years. Cf. *Kehoe-Berge Coal Co.* v. *Commissioner*, 41 B. T. A. 282, 286–287.

It is no answer for petitioner to say that since it could take no allowance for depletion on a cost basis, no opportunity for a shift in basis would be created by a decision allowing it to amend its return. The construction of an Act of Congress obviously cannot be affected by the exigencies of the situation in which the particular taxpayer before the court finds itself. If petitioner has a right to make its election in an amendment filed after the expiration of the statutory period for filing the original return, other taxpayers, to whom an opportunity to shift may be of substantial value, must have a similar right.

The Circuit Court of Appeals for the Fourth Circuit attempted to solve this problem in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388, by ruling that an amendment is timely if filed before the time for the filing of the return for the next succeeding year. Accord: *Lucas* v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951 (C. C. A. 6th). There is nothing in the opinions in either the *Mead* or *Sterl-*

*ing Oil* cases, and nothing in petitioner's brief in the present case, which reveals any logical, to say nothing of any statutory, basis for selecting as the limitation period the time for filing original returns for the next succeeding year. And this judge-made rule, although limiting the opportunity for changing methods of computation to one year, yet allows a shift to be made during that year, contrary to the obvious intent of Congress.

Petitioner seeks to support the *Mead* decision on the ground that the Treasury Department, in practice, has been liberal in authorizing and accepting amended returns filed after the period for filing original returns, and that this alleged practice must be deemed to have been incorporated into the law (Br. 12–20). The contention fails to distinguish between amendments designed simply to correct errors and miscalculations in the original return and amendments designed to change the basis upon which taxable income was computed in the original return. The duty of the Commissioner to assure that net income is correctly reported and the tax thereon correctly computed necessarily carries with it authority to accept and, indeed, occasionally to require, amended returns truly reflecting items of income and deductions which were misreported in the original return. The Treasury rulings referred to by petitioner as establishing the administrative practice with respect to amended returns (Br. 12–13) all relate to matters of this character.

But the Commissioner has no authority to accept, and has not accepted in practice, amendments which, rather than being designed to reflect true income by correcting mistakes, are designed simply to allow the taxpayer to take advantage of a statutory choice between different methods of reporting income, after the expiration of the statutory period provided for making the choice. Thus, where a husband and wife file a joint return, the Commissioner has no authority to permit, and has not permitted, the filing of separate returns after the statutory period for filing returns has expired (*Rose* v. *Grant*, 39 F. (2d) 340 (C. C. A. 5th); *Buttolph* v. *Commissioner*, 29 F. (2d) 695 (C. C. A. 7th); *Champlin* v. *Commissioner*, 78 F. (2d) 905 (C. C. A. 10th); I. T. 1372, I–1 Cum. Bull. 238); where affiliated corporations file separate returns, the Commissioner has no authority to permit, and has not permitted, a change by untimely amendment to a consolidated return (*Alameda Inv. Co.* v. *McLaughlin*, 33 F. (2d) 120 (C. C. A. 9th); *Radiant Glass Co.* v. *Burnet*, 54 F. (2d) 718 (App. D. C.)); where profits from realty sales are originally reported according to the deferred-payment method, the Commissioner has no authority to permit, and has not permitted, the filing of an untimely amendment computing the profits according to the installment method (*Pacific National Co.* v. *Welch*, 304 U. S. 191). The present situation is of the same type: the taxpayer is attempting to

change the method adopted in its original return for computing its depletion allowance by taking advantage of a statutory right of choice after the statutory period for making the choice has terminated. For this, administrative practice furnishes no precedent whatever.

Petitioner also seeks to support its position by pointing to the apparent inequity and hardship which would be imposed upon it by the construction of the statute for which we contend. It urges, in effect, that by reason of its remote location in Alaska, it never had an opportunity to elect between cost and percentage depletion and that therefore its failure to elect percentage depletion should not be considered binding upon it. The primary factual basis for this contention is that the slowness of the mails required it to file its return for 1934 on a 1933 form.

Considerations of equity seem hardly material to the question of whether, under the statute, petitioner has a right to the deduction which it claims. The allowance of deductions does not turn on general equitable considerations. *Deputy* v. *du Pont*, 308 U. S. 488, 493. Congress may condition, limit, or deny deductions in any manner it sees fit (*Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371) and only such deductions as may be brought squarely within the four corners of the statute can be allowed (*New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435). It may be, as petitioner contends, that it was the

purpose of Congress in enacting Section 114 (b) (5) to liberalize depletion allowances, but if so, as the court below pointed out, "the liberality was confined to the offer" and "did not extend to the time or manner of taking advantage of it" (R. 56).

In any event, the equities upon which petitioner relies are more apparent than real. Specifically, the fact that petitioner was forced to file its 1934 return on a 1933 instead of a 1934 form is entirely immaterial, since the instructions contained on the two forms with respect to depletion were almost identical. The 1933 forms were promulgated under the Revenue Act of 1932. As we have pointed out, Section 114 (b) (4) of that Act allowed taxpayers to take percentage depletion for 1933 with respect to metal mines and required them to state in their 1933 returns whether they elected to compute depletion on this basis for 1934 and all succeeding years. Section 114 (b) (4) of the 1934 Act simply reenacted Section 114 (b) (4) of the 1932 Act, giving, however, a new opportunity of election.

The instructions appended to the 1933 forms provided as follows with respect to depletion (R. 21):

> 23. DEPLETION.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in

> previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

The instructions with respect to depletion appended to the 1934 forms were precisely the same as the instructions appended to the 1933 forms except that the reference in the last sentence was to Sections 23 (m) and 114 of the Revenue Act of 1934 instead of to Sections 23 (1) and 114 of the Revenue Act of 1932.

These facts, we believe, considerably dilute the equity which petitioner seeks to create by pointing to its remote location. Ever since the enactment of the Revenue Act of 1932 on June 6, 1932 (c. 209, 47 Stat. 169) petitioner had the right to elect to take percentage depletion. That it remained ignorant of the law from that time until August 1935, when a revenue agent advised petitioner as to the provision for depletion allowance, cannot, we submit, be attributed solely to the remote location of the company and cannot serve as a basis for according the petitioner special consideration.

Nor is any special equity created by the fact that petitioner's failure to elect percentage depletion may deprive it of all allowance for depletion in the

future. If this be the case, it is only because petitioner has already recovered its capital through depletion allowances based on cost. Plainly, if petitioner has had its depletable capital restored to it by deductions previously allowed, the grant of a further allowance for depletion must be based on other than equitable considerations.

Moreover, it is not at all certain that petitioner will not in the future be entitled to an allowance for depletion on the cost basis. As the Board of Tax Appeals pointed out in *Kehoe-Berge Coal Co.* v. *Commissioner,* 41 B. T. A. 282, 286, development costs are a commonplace in the mining industry and improvements, extensions, and other capital expenditures can, under appropriate circumstances, place a mining enterprise in a position where a cost basis is created. This being so, it is impossible to state categorically that petitioner's failure to elect percentage depletion will deprive it of all depletion allowance for the future, or, indeed, that cost depletion may not ultimately prove beneficial to it.

We submit, therefore, that neither the statute which controls decision, nor the special equities upon which petitioner relies, support petitioner's contentions. To the contrary, the statutory scheme seems clearly to require that the taxpayer make an election on or before the date on which its original return must be filed and that it be denied the right thereafter to alter its choice. This taxpayer made

its election in its 1934 return by failing to state its preference for percentage depletion. Upon the expiration of the time for filing the 1934 return, that election became final and petitioner became bound, not only for 1934 but for all subsequent years. That petitioner was ignorant of the law and that this ignorance was the reason for its failure to elect percentage depletion cannot affect the result; the statute contains no saving clause relieving a taxpayer, or authorizing the Commissioner to relieve him, from the consequences of the rule on a showing that he was ignorant of it. And surely, as the court below pointed out (R. 57), the meaning of the statute cannot be varied to meet the mental state of those affected by it.

## II

There is no merit in petitioner's contention that the court below erred in disposing of the case on a ground not considered by the Board. The case was argued by the Commissioner before the Board, and was decided by the Board, on the theory that an amended return was not a "first return" irrespective of the question of timeliness. Petitioner urges that, in this posture of the case, the court below could not with propriety consider or decide the question of the timeliness of the amendment. The contention runs directly counter to the decision in *Helvering* v. *Gowran,* 302 U. S. 238, holding that a Circuit Court of Appeals may affirm a decision of

the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* 309 U. S. 344, cited by petitioner, holds merely that a decision of a lower court may not be reversed on a ground abandoned below. That rule is, of course, inapplicable here.

## CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
*Solicitor General.*
SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
SEWALL KEY,
RICHARD H. DEMUTH,
JOSEPH M. JONES,
*Special Assistants to the Attorney General.*

OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

# SUPREME COURT OF THE UNITED STATES.

No. 50.—October Term, 1940.

J. E. Riley Investment Company, Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 12, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on certiorari to resolve the conflict of the decision below (110 F. (2d) 655) with *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388.

Petitioner is engaged in the business of mining gold at Flat, Alaska. The winter mail service to and from that remote place was so uncertain and slow that, in order to avoid delinquency in income tax returns, petitioner's officers were accustomed to use the forms for an earlier year. Consequently petitioner's original return for the calendar year 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector at Tacoma, Washington. This return was executed on January 2, 1935, and reached Tacoma on January 29, 1935. When it was executed petitioner did not know of the provision[1] in the Revenue Act of 1934 (48 Stat. 680) allowing percentage depletion. But petitioner did know that unless the law had been changed it was not entitled to depletion, as it had no basis for cost depletion. The Collector in sending the 1933 forms had not

[1] Section 114(b)(4) provided:

"The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to per-

advised petitioner with respect to percentage depletion. And it was found that if petitioner had known of the statutory provision for percentage depletion, it would have elected to take advantage of it. Petitioner first actually learned of the provision in August, 1935. On March 3, 1936, petitioner filed an amended return for 1934 upon which a deduction of percentage depletion was taken; and it asked for a refund. The Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion and the Circuit Court of Appeals affirmed.

Sec. 114(b)(4) of the 1934 Act required the taxpayer to elect in his "first return" whether the depletion allowance was to be computed with or without regard to percentage depletion. The method so elected is applicable not only to the year in question but to all subsequent taxable years.

We think that petitioner's amended return, filed on March 3, 1936, was not a "first return" within the meaning of § 114(b)(4). By § 53(a)(1) of the 1934 Act, the return was due on or before March 15, 1935. By § 53(a)(2) the Commissioner was empowered to grant a reasonable extension for filing returns[2] but, so far as applicable here, not exceeding six months. *Haggar Co.* v. *Helvering*, 308 U. S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a "first return" within the meaning of § 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return.

We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.[3] This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they

centage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section."

[2] See Treasury Regulations No. 86, Arts. 53-1—53-4 inc.

[3] See, for example, Treasury Regulations No. 86, Art. 43-2, governing the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year. Cf. *Union Metal Mfg. Co.*, 1 B. T. A. 395.

existed. Petitioner is seeking by this amendment not only to change the basis upon which its taxable income was computed for 1934 but to adopt a new method of computation for all subsequent years. That opportunity was afforded as a matter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of § 114(b)(4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function.

Strong practical considerations support this position.

If petitioner's view were adopted, taxpayers with the benefit of hindsight could shift from one basis of depletion to another in light of developments subsequent to their original choice. It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.

Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it by § 114(b)(4) of the 1934 Act and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

Finally, petitioner asserts that we cannot consider the question of the timeliness of the amended return since before the Board of Tax Appeals and the Circuit Court of Appeals respondent urged only that petitioner's claim was based upon an amended, rather than an original, return. But even on the assumption that that issue did not embrace the question of timeliness, the Circuit Court of Appeals was justified in affirming the decision of the Board of Tax Appeals. Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246.

*Affirmed.*